88-1898

Supreme Court, U.S.
FILED
JUL 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

STATE OF WASHINGTON,

Respondent,

v.

BYRON REECE, TERRY R. STYERS, J-R DISTRIBUTORS, INC., a Washington corporation, RICHARD NELSON REGAN and MICHAEL DAVID REGAN,

Petitioners.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN W. LADENBURG
Pierce County
Prosecuting Attorney

CHRIS QUINN-BRINTNALL
Senior Appellate Deputy

946 County-City Building
Tacoma, Washington 98402
Telephone: (206)591-7400

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

STATE OF WASHINGTON,

Respondent,

v.

BYRON REECE, TERRY R. STYERS, J-R DISTRIBUTORS, INC., a Washington corporation, RICHARD NELSON REGAN and MICHAEL DAVID REGAN,

Petitioners.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN W. LADENBURG
Pierce County
Prosecuting Attorney

CHRIS QUINN-BRINTNALL
Senior Appellate Deputy

946 County-City Building
Tacoma, Washington 98402
Telephone: (206)591-7400

QUESTION PRESENTED

1. Should this court review a state court's construction of a state statute, under the state constitution[1] in which the state legislature required additional protection by providing that materials might vicariously absorb serious literary, artistic, scientific or political value from the context in which the items were used?

---

[1]This court previously upheld the statute against federal constitutional challenges in Brockett v. Spokane Arcades, 472 U.S. 491 (1985).

LIST OF ALL PARTIES TO THE PROCEEDINGS

Respondent: State of Washington, through Pierce County Prosecuting Attorney, John W. Ladenburg, and his deputy, Chris Quinn-Brintnall;

Petitioners: Byron Reece, Terry R. Styers, J-R Distributors, Inc., a Washington corporation, Richard Nelson Regan and Michael David Regan, through their attorney, Victor V. Hoff, P. O. Box 17514, Seattle, Washington 98107

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED. 3

STATEMENT OF THE CASE. 7

REASONS FOR DENYING PETITION 9

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

FEDERAL

Baggett v. Bullitt,
377 U.S. 360 (1964) 11

Garner v. Louisiana,
368 U.S. 157 (1961) 11

Miller and California,
413 U.S. 15 (1973) 14

Morissette v. United States,
342 U.S. 246, 263 (1957) 10

Roth v. U.S.,
354 U.S. 476 (1957) 14

Spokane Arcades, Inc.
v. Eikenberry, 544 F.Supp.
1034, 1039-40 (E.D. Wash. 1982) 13

United States v.
Thirty-seven Photographs,
402 U.S. 363 (1971) 10

WASHINGTON

State v. Reece, 110 Wn.2d
766, 757 P.2d 947 (1988) 11

Constitutional Authority

28 USC 1257(3) 2

U.S. Const. Amend 1 6

Wash. Const. Art. 1 § 5 6

Statutes

Wash. Rev. Code 7.48A.010 . . . . . 3, 7

Wash. Rev. Code 9.68.140 . . . . . 3, 7

Rules and Regulations

Supreme Court Rule 17.1 9

OPINIONS BELOW

The opinion below is reported at 110 Wn.2d 766 (1988) and 757 P.2d 947 (1988) together with a consolidated matter from another county and appended to the petition. The status of the consolidated party is not known.

JURISDICTION

Petitioner, Reece, invokes jurisdiction pursuant to 28 USC 1257(3), Supreme Court review of a final judgment of the highest court of a state which allegedly is repugnant to the constitution. The Washington Supreme Court opinion in question interprets a state statute based upon state constitution in a manner which is not repugnant but more protective than the federal constitution. The decision allows obscene material to escape prosecution if serious literary artistic, scientific or political values can be imputed to the material from the context in which it is used. I.e. evidence in a legal education course involving sexual terrorism; a prop in a stage production of "Portnoy's Complaint."

This court should decline to assert jurisdiction in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Wash. Rev. Code 9.68.140:

A person who, for profit-making purposes and with knowledge, sells exhibits, displays, or produces any lewd matter as defined in RCW 7.48A.010 is guilty of promoting pornography. Promoting pornography is a class C felony and shall bear the punishment and fines prescribed for that class of felony. In imposing the criminal penalty, the court shall consider the wilfulness of the defendant's conduct and the profits made by the defendant attributable to the felony. All fines assessed under this chapter shall be paid into the general treasury of the state.

Wash. Rev. Code 7.48A.010:

The definitions set forth in this section shall apply throughout this chapter.

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual or violent conduct which appears in the lewd matter, or knowledge of the acts of lewdness or prostitution which occur on the premises, or knowledge that controlled substances identified in ARticle II of chapter 69.50 RCW and not authorized by that chapter, are manufactured, delivered or possessed, or where any such substance not obtained in a manner authorized by chapter 69.50 RCW is consumed by ingestion, inhalation, or injection or any other means.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which explicitly depicts or describes patently offensive representations or descriptions of:

(i) Ultimate sexual acts, normal or perverted, actual or simulated; or

(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

(3) "Lewdness" shall have and include all those meanings which are assigned to it under the common law.

(4) "Matter" shall mean a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;

(d) Film, glass slides, or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure, or places, or any separate part or portion thereof, whether permanent or not, or the ground itself.

(8) "Prurient" means that which incites lasciviousness or lust.

(9) "Publication" shall include any book, magazine, article, pamphlet, writing, printing, illustration, picture, sound recording, or coin-operated machine.

(10) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer of possession of, lewd matter.

U.S. Const. Amend 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Wash. Const. Art. 1 § 5:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

STATEMENT OF THE CASE

On July 17, 1985, Pierce County Sheriff Officers executed a warrant at an adult book store owned by J-R Distributors, Inc., in Parkland, Washington, called Sportland. They were searching for copies of a magazine entitled "Chains and Whips" a copy of which had been purchased by an undercover officer on July 16, 1985.

Based on review of the magazine the Pierce County Prosecutor charged the manager, clerk and corporation with one count of promoting pornography in violation of Wash. Rev. Code 9.68.140 and Wash. Rev. Code 7.48A.010.

The matter was tried to a properly instructed jury which returned a verdict of guilty.

Ultimately the Supreme Court of the State of Washington, accepted review. The State Supreme Court examined the statute

under federal and state constitutional provisions and held that the statute met constitutional requirements.

No specific "context" issue was briefed and raised in the Reece case, although the challenge was presented in numerous other cases pending at the same time and was mentioned during oral argument.

REASONS FOR DENYING PETITION

Supreme Court Rule 17.1 sets forth three "Considerations Governing Review on Certiorari." This case meets none of them. Petitioner is requesting this court review and reinterpret a state statute fully and correctly construed by the highest court of the State of Washington under Washington State Constitution and this court under the federal constitution. The Washington Supreme Court's construction of the Washington promoting pornography state neither conflicts with a decision of another state court of last resort nor involves a question of federal law which needs to be reexamined by this court only four (4) years after having upheld the same statute.

I. THIS SUPREME COURT LACKS AUTHORITY TO CONSTRUE STATE STATUTES.

Petitioner invites this court to do what is previously refused to do and what the courts of Washington have refused to do: deliberately construe a state statue in a manner not intended by the legislature to render it unconstitutional.

It is the responsibility of the legislature, not the court, to define crimes. Morissette v. United States, 342 U.S. 246, 263 (1957). The Washington State Supreme Court properly left this matter to the legislature. This court should do the same.

This court generally lacks authority to construe state statues. United States v. Thirty-seven Photographs, 402 U.S. 363 (1971). Where, as in the instant case, state courts have construed state statutes in accordance with the federal constitution and under a more limiting state constitutional

provisions this court ordinarily accepts the construction given by the local court and will not substitute its own judgment for that of the highest court of the state. See, Baggett v. Bullitt, 377 U.S. 360 (1964); Garner v. Louisiana, 368 U.S. 157 (1961).

The construction given by the trial courts (both state and federal) which reviewed the constitutionality is as follows:

> The language of Article 1 Section 5 is significantly different from the First Amendment and often will support a broader protection for free speech in Washington. The narrow inquiry in this case is whether "obscene" speech . . . deserves broader protection under Article 1, Section 5 than is afforded by the federal case law construing the First Amendment.

State v. Reece, 110 Wn.2d 766, 757 P.2d 947 (1988).

"Finally, the third prong of Miller as embodied in Section 1(2)(c), is also attacked by plaintiffs as an impermissible expansion of settled precedent. This section provides

that material failing the first two prongs which also, "when considered as a whole, and in the context in which it is used, lacks serious literary, artistic or political, or scientific value" will be deemed obscene. Objection is taken to the phrase "in the context in which it is used." (Emphasis added).

Where this language found in either the first or second prongs, which are the province of the jury and already highly subjective in nature, this modification of Miller might prove more troubling . . . However, such is not the case here. By inserting the phrase in the third prong, i.e., the objective test, this language, if anything, serves a limiting function and enhances the specificity with which a trial court must address the existence of literary, artistic, political, or scientific value."

Spokane Arcades, Inc. v. Eikenberry, 544 F.Supp. 1034, 1039-40 (E.D. Wash. 1982).

Simply put, the test in Washington is whether the material taken as a whole and in the context of its use has any serious literary, artistic, political, or scientific value. In contrast, the pandering cases relied on by petitioner concern cases in which the material as a whole does not meet constitutional obscenity standards but the context gives it a meaning which does.

CONCLUSION

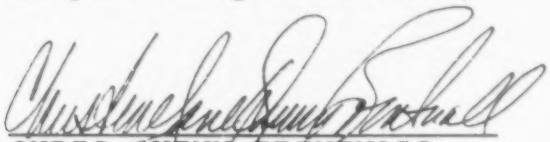
Petitioner's conviction is based upon substantial evidence falling within the hard core of the conduct proscribed by the statute. The jury's verdict was the natural result of careful fact finding and law application; as such it should remain undisturbed.

The statute was carefully drafted to meet or exceed the Miller and California, 413 U.S. 15 (1973) and Roth v. U.S., 354 U.S. 476 (1957), standards without infringing on constitutionally protected pornographic materials.

The statute has been fully examined first by the federal then the state courts and found to violate no federal or state constitutional provisions and should remain untouched by this court.

The State of Washington, therefore, respectfully requests that defendant's petition for a Writ of Certiorari be denied.

Respectfully submitted,



CHRIS QUINN-BRINTNALL
Pierce County Deputy
Prosecuting Attorney